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motion for a rehearing was denied on March 2, 1954 (R. 401). On May 26, 1954, by order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to and including July 30, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

The Merchant Ship Sales Act of 1946 authorized the Maritime Commission to sell surplus war-built vessels at a "statutory sales price" to be established by the Commission pursuant to statutory guides. In purchasing tankers from the Commission under this Act, respondents expressly agreed (under protest) to pay for certain valuable features which the Commission believed it was entitled to take into account. After receiving the ships, the respondents sued in the Court of Claims to recover the sums paid for these features on the ground that the Act did not authorize their inclusion in fixing the "statutory sales price". The Court of Claims agreed with respondents and gave them judgment. The questions presented are:

1. Whether the Ship Sales Act (a) creates in buyers judicially enforceable rights to purchase vessels at a price precisely calculated according to the statutory formula, and (b) deprives the Maritime Commission of authority to interpret, add to, or enlarge upon the factors specifically

included in the legislative definition of the selling price.

2. Whether, after the contracts are performed, the buyers are estopped to demand repayment of part of the contract price while retaining the ships.

3. Whether the Court of Claims could properly order the Government to repay a part of the purchase price without affording the Maritime Administration (successor to the Commission) an opportunity to determine whether it would have made the sales without the provisions invalidated by the court.

4. Whether the Court of Claims has jurisdiction of an action to recover money required by an administrative agency to be paid to it under color of a statutory authorization.

STATUTE INVOLVED

The pertinent provisions of the Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended, 50 U. S. C. App. 1735 *et seq.*, are set forth in Appendix A, *infra*, pp. 27–30.

STATEMENT

The respondents brought two actions (under 28 U. S. C. 1491), which were consolidated for trial (R. 183), in the Court of Claims to recover part of the purchase price of ships bought by them from the United States Maritime Commission under the Merchant Ship Sales Act of 1946,

infra, pp. 27–30 (R. 2, 32). Their claim was that the Commission had violated the pricing formula of the Act by imposing each of two charges: (1) a charge of $16,600.00 to each buyer for the installation of "slotting and strapping" in the hulls of their ships (R. 5, 35), and (2) a charge of $5,116.79 to the respondent Southeastern for the value of certain repairs made by the Commission on Southeastern's vessel before her sale (R. 7). The claims were upheld by the court on respondents' motions for summary judgment. The pertinent facts, as they appear from the pleadings and exhibits, are as follows:

Southeastern purchased the S. S. *Kern Hills* from the Maritime Commission under a contract dated January 14, 1948 (R. 10), and Paco purchased the S. S. *Northfield,* under a contract dated February 26, 1948 (R. 40). Both the *Northfield* and the *Kern Hills* were type T2–SE–A1, or, as they were commonly known, type T2 tankers, two of a class of some 500 war-built tankers having hulls of all-welded construction, most of which were offered for sale under the Ship Sales Act (R. 126, 192).

The statutory pricing formula. Section 4 of the Act, *infra,* p. 30, directed the Commission [2]

[2] The functions of the Commission were transferred to the Secretary of Commerce, acting through the Maritime Administration, in 1950. 15 F. R. 3178; 64 Stat. 1276, 1277. Power to sell vessels under the Act terminated on January 15, 1951, by virtue of Section 14 (60 Stat. 50, as amended, 50 U. S. C. App. 1735, note).

to sell war-built ships at a "statutory sales price" to be established by the Commission in the manner described below. Section 3 (d) defined the "statutory sales price" in terms of a percentage, 87½ in the case of tankers, of "prewar domestic cost." "Prewar domestic cost" was to be the cost, as estimated by the Commission, of constructing a hypothetical standard tanker in American shipyards under conditions prevailing on January 1, 1941. After thus calculating the standard "statutory sales price," the Commission was to make certain adjustments, as they might apply to each vessel sold. These adjustments were: (1) a deduction for depreciation, according to the age of the ship; (2) a deduction for the cost of putting the ship "in class,"[3] in cases where the condition of the vessel was below the minimum class requirements of the Coast Guard and the American Bureau of Shipping; (3) a deduction for the cost of installing any "desirable features" (other than features necessary to put the vessel in class) that might be present in the Commission's hypothetical standard vessel but absent from the particular vessel sold; and (4) an increment to cover the value of desirable fea-

[3] A ship is said to be "in class" when it conforms to the minimum requirements established by regulations of the Coast Guard and of the American Bureau of Shipping in relation to construction, safety features, and the like, and passes inspection by these agencies. See 49 Stat. 1384, as amended, 46 U. S. C. 369; *Southeastern Oil Delaware, Inc.* v. *United States*, 124 C. Cls. 561.

tures contained in the vessel sold and lacking in the standard vessel. Finally, Section 3 (d) provides that the statutory sales price as thus adjusted is in no event to be less than a "floor price," which in the case of tankers is fixed by the Act at 50 per cent of "domestic war cost."[4] On April 23, 1946, the Commission published the controlling figures for T2 tankers. 11 F. R. 4459. These established the unadjusted "statutory sales price" at $2,026,500 and the "floor price" at $1,505,352.

Slotting and strapping. During World War II, ships, including tankers, were built with welded hulls, the first use of all-welded construction on a large scale (R. 128). The former practice of riveting was abandoned in the interest of savings in time and in drain on the labor force (R. 126, 128). After welded hulls had come into extensive use, it began to appear that, owing to the somewhat rigid structure created, the welded plates tended to crack, and the cracks tended to extend entirely around the hull, so that a number of T2 tankers broke in two (R. 128–133). To combat this deficiency, the device of crack arrestors, or "slotting and strapping", was developed (R. 232, 235). This device consisted of cutting four longitudinal slots, about two hundred feet in length,

[4] "Domestic war cost," like prewar domestic cost, is a figure fixed by the Commission; it is based on the cost of a hypothetical ship, calculated on the basis of labor and material prices as of 1944.

in the hulls and covering these slots with riveted steel straps (R. 138–143, 236–239). By this means flexibility was introduced, so that cracks that started in the welded plates would stop at the riveted straps and not spread around the entire hull (R. 119). In May 1947, the American Bureau of Shipping recommended the installation of slotting and strapping on all T2 tankers (R. 236–238), and on December 15, 1947, the Commandant of the Coast Guard directed the withholding of certificates of inspection from ships that failed to comply (R. 144).

When the American Bureau of Shipping recommended the installation of slotting and strapping in May 1947, the Maritime Commission undertook to perform this work on all T2 tankers that were up for sale to American buyers (R. 244). The Commission took the position, however, that the buyers should be required to pay the cost of the installation. A number of prospective buyers included with their offers covering letters to the effect that, in the buyers' view of the law, they could not be required to pay for this work (R. 241–242). These offers the Commission rejected (R. 241–242).

Pursuant to its policy of requiring buyers to pay for the cost of slotting and strapping, the Commission inserted in the contracts offered to both respondents, in early 1948, the following clause (R. 4, 33):

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> Any vessel of the T2 type that is strengthened [*i. e.,* slotted and strapped] * * * shall be considered as having an additional desirable feature within the meaning of clause (3) of Section 3 (d) of the Act, and the Buyer shall pay for such additional desirable feature an amount determined by the Commission * * *.

The contracts containing these clauses were accepted by the respondents (*ibid.*), both respondents, however, returning with the signed contracts letters protesting against the inclusion of these clauses (R. 21, 34). Under these clauses the respondents deposited $28,875 each, pending determination by the Commission of the sum to be added to the statutory sales price to account for slotting and strapping (R. 5, 34). In June 1951, the Commission determined that the amount to be charged the buyers for slotting and strapping was to be $16,600.00 per vessel (R. 253); deducting this amount from the sum deposited by respondents, the Commission returned the balance to respondents (R. 5, 35). The amount thus paid by them the respondents sought to recover in the present actions.[5]

[5] As appears from the provision quoted above, pp. 8-9, the contracts of sale contemplated that the increase in the statutory sales price be computed by treating slotting and strapping as a "desirable feature" within the meaning of the Act. At the time of the contracts the Commission's method of adjusting for the presence of desirable features involved adding the value of the desirable features to the figure first obtained by making all other adjustments under the Act. Thus, in the case of Southeastern, $16,600.00 was added to

Repair work. During the period that vessels were being sold under the Ship Sales Act, the Maritime Commission continued to operate for its own account, under general agency agreements, many of the vessels subject to sale.[6] The vessels thus operated included a number of T2 tankers. In the operation of these ships the Commission spent its funds on upkeep and repairs, which the Commission carried out on a scale considerably larger than the minimum necessary to keep the ships "in class" (R. 247–250). As a result, most prospective buyers under the Ship Sales Act found it desirable to apply for ships in operation rather than for laid-up vessels. Not only would

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the adjusted statutory sales price of $1,737,808.79 (R. 14); and in the case of Paco, because the statutory adjustment for depreciation reduced the statutory sales price to the floor price of $1,505,352.00, the figure of $16,600.00 was added to the floor price.

In 1952, however, the decision of the court below in *A. H. Bull S. S. Co.* v. *United States*, 123 C. Cls. 520, altered the method of computation to one whereby the cost of desirable features was in effect added to the unadjusted statutory sales price before the other adjustments were made. Thus, as to each T2 tanker, $16,600.00 was added to the unadjusted statutory price of $2,026,500.00, and the resulting figure was then adjusted for depreciation and class allowance, if any. The effect was to subject desirable features to a deduction for depreciation as though they had been in the vessel from its launching. R. 51–53.

[6] The Commission's wartime authority to operate vessels under general agency agreements for government account was extended to March 1, 1948, by the Act of June 28, 1947, c. 161, 61 Stat. 190. $100,000,000 was appropriated for these operations during 1948. Act of July 31, 1947, c. 414, 61 Stat. 695, 697.

purchasers of such vessels acquire ships in better condition than the minimum required to keep the ships in class, but also they would obtain vessels that could be put into service without loss of the time required for putting the ships in class. The *Kern Hills,* for which the respondent Southeastern applied, was such a ship (R. 22).

The Commission was of the view that purchasers should pay the cost of such repair work, on the theory that buyers of those ships would be receiving more value than buyers of laid-up ships (R. 247–250). This position was strengthened when, after July 1, 1947, Congress forbade the Commission to use appropriated funds for the purpose of placing in class ships held for sale (Act of July 30, 1947, 61 Stat. 585, 603); the use of its own funds in repairing vessels for government operation, when the vessels shortly thereafter might be sold under the Ship Sales Act, the Commission regarded as an indirect violation of Congress' prohibition.

Accordingly, the Commission tendered to Southeastern a contract containing a clause (R. 6–7) requiring Southeastern to pay the cost of repairs in excess of the repairs necessary to meet class requirements.[7] Southeastern accepted this clause by executing the contract of which it was a part,

[7] The contract provided that this charge was to be reduced by $6,000 a month, representing depreciation, over the period that the ship was operated for Government account (R. 6).

and deposited $21,781.00 with the Commission, under the clause, to cover these repair charges pending determination by the Commission of their precise amount. The Commission subsequently determined the amount, and after making the adjustments called for by the repair clause found that $5,116.79 should be retained by the Government (R. 7).

The proceedings below. After executing the contracts, both respondents obtained delivery of and paid for the ships. In 1952, they brought these actions, seeking to recover the $16,600 paid by each of them for slotting and strapping and, in the case of Southeastern, the $5,116.79 paid for excess repairs. Both respondents moved for summary judgment. They contended that the slotting and strapping clause of the contracts was invalid because it was not authorized by the statute. Their theory was that no additions to the statutory sales price were provided by the Act except additions for desirable features and that, despite the fact that the contracts provided that slotting and strapping was a desirable feature, it could not be considered a desirable feature within the meaning of the Act, since it was a class requirement for all T2 tankers. Respondents contended that, because the clause was unauthorized, they were entitled to recover that part of the purchase price that represented the charge

for this element.[8] Southeastern made a similar contention in respect to the charge for repairs.

The Government's primary argument was that, whether or not slotting and strapping could validly be treated as a desirable feature under the Act, the Commission had power to reach a similar result by re-evaluating the hypothetical standard T2 tanker (on which the statutory sales price was based), so that slotting and strapping would be an integral feature of the standard vessel.[9] This, it was urged, the Commission had refrained from doing in reliance on the buyers' acceptance of the contract clause; therefore, the buyers were estopped to challenge the validity of the clause. As to the repair provision, the Government urged that this was a valid exercise of the Commission's power to administer the Act to carry out the policy announced by Congress.

The Court of Claims held that the Act required the Government to pay for repairing defects in ships sold and that slotting and strapping was equivalent to repairing a defect. It rejected the

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[8] Respondents also urged that the Commission had not applied the pricing formula in the way prescribed by *A. H. Bull S. S. Co.* v. *United States*, 123 C. Cls. 520, application of which would have eliminated the charge in the case of Paco, which was sold at the floor price. See fn. 5, *supra*, pp. 8–9.

[9] The statutory sales price for T2 tankers was established in April 1946 (*supra*, p. 6); slotting and strapping became a class requirement in 1947 (*supra*, p. 7); the two vessels were sold to respondents in January and February 1948 (*supra*, p. 4).

estoppel argument on the ground that "the parties could not, by contract, change the terms prescribed by the statute for the sale of the ships." Accordingly, it awarded summary judgment for the respondents (*infra*, p. 41). The Government moved for a rehearing, raising among other questions that of the jurisdiction of the court; this motion (R. 339) was denied (R. 401).

REASONS FOR GRANTING THE WRIT

This case presents important issues as to the power of the Court of Claims to excise, at the behest of the suing contractor, portions of executed disposal contracts which deviate from the court's interpretation of the statute authorizing the transactions, and then to compel unilateral readjustment of the contract price in favor of the contractor. These questions directly affect a large number of pending and prospective claims under the Merchant Ship Sales Act,[10] but they

[10] The Maritime Commission sold 149 T2 tankers under contracts containing clauses requiring, in terms substantially similar to those of the present contracts, that the cost of slotting and strapping be added to the purchase price. These 149 ships involve potential claims for slotting and strapping alone of well over $2,000,000. Sixty-five (65) of these claims are already pending in the court below. Some twenty-five (25) of the cases pending below also involve clauses, similar to that in Southeastern's contract, concerning payment for repairs on vessels formerly operated by the Commission (*supra*, pp. 9–11); these repair claims amount to roughly $750,000. Finally, the validity of contract terms adopting a challenged view of statutory pricing provisions is involved in a large number of charters under Section 5 of the Ship

extend by implication to the entire field of government procurement and the disposal of government property. Together with the companion case of *United States* v. *Clapp* (No. 248, this Term), the case also raises the significant issue of the right of one who obtains government property or other benefits from an administrative agency on an agreed condition to retain the benefit of the administrative award while attacking the validity of the condition. As a corollary, this and the *Clapp* case involve the power of the Court of Claims to set aside a term of the contract without affording the administrative agency an opportunity to show whether it would have entered into the transaction in the absence of the allegedly invalid term.

All these questions the court below has summarily disposed of without considering controlling principles long established by this Court in the field of government contracts. Fresh affirmation of these doctrines by the Court will be of

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Sales Act. Section 5 provided that the Commission might charter vessels to private applicants under bareboat charters providing for payment to the government as charter hire of one-half of all profits in excess of ten per cent. The Commission entered into charters providing for recapture of profits on a sliding scale ranging up to 90 percent of profits in excess of ten per cent. If, as seems likely, these rates are held by the court below, on the basis of the present decision, to be recoverable by the charterers as violating the terms of the statute, the Maritime Administration estimates that the government will be open to potential claims of $40,000,000.

widespread importance both in the maritime field and more generally.

1. The initial holding of the Court of Claims was that the contract provisions adding the cost of slotting and strapping and of prior repairs were not consonant with the pricing formula fixed by the Act, and that the parties could not, by contract, interpret the statutory pricing formula differently from the view subsequently adopted by the court. In both respects, we think, the court ignored settled principles for construing legislation authorizing contracts for the procurement or disposal of government property.

a. By holding that "the parties could not, by contract, change the terms prescribed by the statute" (App. 36), the court in effect held that the statute confers rights on the buyer apart from the contract. Such a decision overlooks the broad principle of *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, that statutes prescribing the terms on which government procurement and disposal agencies are to contract confer no rights on the sellers or buyers to sell or buy on the statutory terms; these statutes constitute merely directions to, and a conferral of authority by the Government upon, its agents. As the Court has said, legislation specifying the terms on which a government agency must contract is "not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed

restraint for violation of which the Government—but not private litigants—can complain." *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 127; cf. *Goldberg* v. *Daniels,* 231 U. S. 218, 221; *United States* v. *New York and P. R. S. S. Co.,* 239 U. S. 88, 92, 93.

The Ship Sales Act conforms with this accepted principle. The Commission was authorized to sell to qualified applicants at the "statutory sales price," but determination of the "statutory sales price," involving appraisal of many complex industrial factors, was, as we show below, *infra,* pp. 17–20, necessarily committed to the Commission. And before making a sale the Commission was to find both that the potential purchaser was qualified and also "that such sale will aid in carrying out the policies of this Act". Section 4, *infra,* p. 30. No provision in the statute indicates that Congress endowed the buyer with judicially enforceable rights to compel the Commission to accept his interpretation of the statutory sales price and to dispose of the vessel at that figure. On the contrary, the Act contemplates that ship sales be consummated by contract (see, *e. g.,* Section 4 (c)) and the inference is clear that the parties were to be bound by the terms on which they agreed. In short, the statute conferred no right on respondents to have the ships at any particular price; they must look to their contracts as the measure of all the rights they received.

b. In drawing the buyers' rights directly from the statute rather than from the contracts, the Court of Claims also overlooked the broad discretion conferred by the Ship Sales Act on the Maritime Commission in establishing the sales price. The parties agreed by their contracts that slotting and strapping should be treated as a "desirable feature" within the meaning of the statute. *Supra,* pp. 7–8. The court was of the view that slotting and strapping was not a "desirable feature" as it construed that term. But the court was not empowered to substitute its construction for that of the parties.[11] In the field of property disposal, as in the field of government bounties and government contracts, broad latitude is always accorded to the administrative agency in giving content to terms on which the disposal is to be made, "even where executive duties 'require an interpretation of the law.' " *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 127; cf. *United States ex rel. Dunlap* v. *Black,* 128 U. S. 40, 48; *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U. S. 682.

Aside from some competitive bidding legislation, statutes authorizing the acquisition or sale of property by the Government are normally read, not as confining the official narrowly to the literal

[11] That a contract may use some of the same terms as the Act (e. g. "desirable features") does not mean that these terms must bear the same meaning as the court would give them in construing the statute on a *de novo* appraisal. Cf. *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U. S. 667, 678.

terms of the text, but as conferring a wide span of business judgment in negotiation; enactments setting forth in as great detail as the Ship Sales Act the specifications and terms on which the Government's agents should contract have been held not to prevent the Government from contracting on terms more advantageous than those prescribed by the statute. *Gilbert & Secor* v. *United States,* 8 Wall. 358; cf. *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 357–358. For it is not lightly to be assumed, at least in the commercial area, that Congress has deprived its agents of authority to make a beneficial agreement for the United States.

Within the seeming specificity of its pricing provisions, the Ship Sales Act actually conferred broad discretion on the Commission, both in fixing the selling price of the ships and in selling them. This the Act primarily did by providing, in Section 3 (c), *infra,* p. 27, that the Commission was to define the contents of the "standard vessel" upon which the entire statutory pricing scheme was based, as well as by leaving undefined the term "desirable features" in Section 3 (d) (3), *infra,* p. 28.[12] It seems that the Commission, had

[12] It is also important to note the constant emphasis throughout the Act on the Commission's "opinion" or "estimation" or "determination" or "satisfaction." See Sections 3 (c), (d) (1) (2) (3) (4), (e) and 4 (a) and (b), *infra,* pp. 27–30. Congress thus evinced a clear purpose not to restrict the Commission within narrow bounds, but to rely on its judgment, discretion, and expertise.

it wished to do so, would have been authorized to include slotting and strapping, or any other feature required of all T2 tankers (as was slotting and strapping in 1948), in its specifications for the standard ship. See *supra,* pp. 5–7. And it could as validly have done so by contract with each purchaser as by regulation applicable to all.[13] Likewise, the Act specifically left to the Commission's expertise the ultimate decision as to what were "desirable features" in war built tankers, (Section 3 (d) (3), *infra,* p. 28), and the Commission in this respect, too, could have exercised its discretion by contract as well as by rule.

These provisions are all significant, but the scope of the Commission's authority to contract for the Government's advantage should not be gathered from them alone, nor even from the express requirement that the ultimate criterion for each sale should be an administrative determination whether or not "such sale will aid in carrying out the policies of this Act." Section 4 (a), *infra,* p. 30. The basic premise should be that, since the Act deals with the disposition of Government property, it is to be construed and applied with the same eye to the protection of the Government's interest as is other legislation of that class.

2. In addition to its misconstruction of the Act, the Court of Claims was not warranted in partially setting aside the transactions, to the

[13] Such a decision would have resulted in the same price that the present contracts fixed.

Government's disadvantage, after the contracts had been fully performed and respondents had taken the benefit of their bargain.

a. Assuming *arguendo* that the respondents had rights under the statute to terms more beneficial than they received, they could waive these rights (cf. *Shutte* v. *Thompson,* 15 Wall. 151), and this they did by accepting and executing the contracts. Just as a party may not accept benefits conferred by a statute and at the same time attack the validity of the conditions imposed by the legislature (*e. g., Fahey* v. *Mallonee,* 332 U. S. 245, 255; *United States* v. *San Francisco,* 310 U. S. 16, 29), respondents should not be permitted to enjoy the benefits of the Commission's administrative decision to award them the ships and attack the validity of the conditions imposed by the Commission. Cf. *Callanan Road Co.* v. *United States,* 345 U. S. 507, 513. This is particularly true where, as here, the conditions are eminently fair and reasonable, and their excision would give the purchasers valuable additional features without requiring any *quid pro quo* in exchange. See also the Government's petition in *United States* v. *Clapp,* No. 24, this Term, pp. 12–13.

In formal terms, the vice of respondents' position is that they are claiming under the very contracts which they attack. They have abided by the terms of the contracts as to time and

manner of payment and as to other details of the transactions; until these actions they never insisted upon their supposed statutory, as distinguished from their contractual, rights.[14] It is settled that a party may not at the same time "claim both under and against the same deed" (*Gibson* v. *Lyon,* 115 U. S. 439, 447). And, in the very field of government contracts for the acquisition or disposal of property, this Court has always held contractors bound to the prices set by their contracts, even though they could have rejected the contracts and insisted on a better price under a statute or the Constitution. *American Smelting & Refining Co.* v. *United States,* 259 U. S. 75; *Matson Navigation Co.* v. *United States,* 284 U. S. 352; *Parish* v. *United States,* 8 Wall. 489, 490; cf. *Gray* v. *Commodity Credit Corp.,* 159 F. 2d 243 (C. A. 9), certiorari denied, 331 U. S. 842.[15]

[14] Respondents apparently sought to save their alleged statutory rights by protesting the inclusion of the disputed terms in the contracts, but nothing is more clearly settled than that they could not by protest alter the legal effect of their contracts. *E. g., American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 79; *International Contracting Co.* v. *Lamont*, 155 U. S. 303, 310; *Gilbert & Secor* v. *United States*, 8 Wall. 358; *Bank of the United States* v. *Bank of Washington*, 6 Pet. 8.

[15] Where the claimants have voluntarily paid money to the Government, they are also faced with the principle that money voluntarily paid to the Government under mistake of law cannot be recovered in the absence of a special statute. *United States* v. *Edmondston*, 181 U. S. 500; *Miller* v. *United States*, 42 C. Cls. 121; see *infra*, pp. 23–24.

Moreover, by their acceptance of the Commission's terms, the respondents may have in effect induced the Commission not to take action that would have increased the statutory sales price in a manner unassailable in the Court of Claims. As we have suggested, *supra,* pp. 18–19, it would have been within the power of the Commission to redefine the standard T2 tanker to include slotting and strapping, an installation required of all such vessels in 1948, the time of the contracts in this case. By doing so, the Commission could have increased the price by an amount similar to that fixed under these contracts as the price of slotting and strapping. Or the Commission could have refused to sell the vessels to purchasers who refused to pay for these additional features.[16] Now that history cannot be turned back, it is fair to hold respondents equitably estopped from denying validity to their contracts. At the very least, respondents should not be permitted to receive part of the purchase price without accounting for the fair value of the advantageous slotting and strapping and the extra repairs which they received. See, *e. g.,* 6 Williston, *Contracts* (Rev. ed.) § 1764.

b. From another viewpoint, the Court of Claims' error may be seen as a usurpation of the administrative discretion of the Maritime Com-

[16] As noted above (*supra*, p. 7), the Commission did reject offers accompanied by letters declaring that the buyers could not be required to pay for slotting and strapping.

mission. In the absence of knowledge as to whether the Commission would have made the sales if it had known that the slotting and strapping and prior repairs clauses would be held invalid, the court could not properly strike those clauses from the contracts and leave the remainder of the transactions standing. Such a procedure is squarely in conflict with the rationale of this Court's recent decision in *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 21; cf. *United States* v. *Jones*, 336 U. S. 641. See also the Government's petition in *United States* v. *Clapp*, No. 218, this Term, pp. 10–12.

The court was evidently of the view that this holding was justified because the statute left no discretion to the Commission, but required it to sell if the buyers were qualified. But, as we have shown (*supra*, pp. 17–19), "the discretion of the [Commission] was not ended by the receipt and opening of the bids, even though they satisfied all the conditions prescribed." *Goldberg* v. *Daniels*, 231 U. S. 218, 221. The Act contemplated that for good reasons the Commission could withhold vessels from sale, and certainly it could choose between qualified applicants for a given ship. There was therefore a choice, and the court should not have assumed to decide for itself that the balance would have swung in favor of the sales to the respondents. The determination was an administrative, not a judicial, one.

3. Finally, the Court of Claims has—*sub silentio* in this case and overtly in the companion case of *United States* v. *Clapp* (No. 248, this Term)—decided an important question as to the scope of its jurisdictional statute (28 U. S. C. 1491) in conflict with controlling decisions of this Court. In our opinion, this case is within the rule that the Court of Claims has no jurisdiction of an action to recover money required by administrative officers of the government to be paid to them under alleged authority of statute. *United States* v. *Holland-American Lijn,* 254 U. S. 148; cf. *United States* v. *Edmondston,* 181 U. S. 500. Our reasons for so believing are set forth in the petition for a writ of certiorari in the *Clapp* case, pp. 16–20.[17] If the rule is now to be abandoned, it should be done by this Court.

CONCLUSION

This case presents important issues bearing on federal procurement and property disposal legis-

[17] Our discussion of this question in the *Clapp* case points out (Pet. pp. 16–20) that jurisdiction may not be based either upon the statutory provision for actions "founded upon any Act of Congress" (28 U. S. C. 1491 (2)) or upon that for claims "for liquidated or unliquidated damages in cases not sounding in tort" (28 U. S. C. 1491 (5)). The only other conceivable basis in this case, the provision for actions "founded upon any express or implied contract" (28 U. S. C. 1491 (4)), is clearly not present. Respondents' whole claim is instinct with rejection of any consensual arrangement with the Government. Cf. *Baltimore Mail S. S. Co.* v. *United States,* 76 F. 2d 582 (C. A. 4), certiorari denied, 296 U. S. 595.

lation, as well as on the relationship of the Court of Claims to federal administrative agencies. A large number of maritime claims, both in the court below and still pending administratively, are directly affected by the ruling, and it seems bound to have a wide impact on other government disposal and procurement programs.

It is respectfully submitted, therefore, that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

JULY 1954.

APPENDICES

APPENDICES

APPENDIX A

The pertinent provisions of the Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended, 50 U. S. C. App. 1735 *et seq.*, read as follows:

Sec. 3.

As used in this Act the term—

* * * * *

(c) "Prewar domestic cost", as applied to any type of vessel, means the amount determined by the Secretary, and published by the Secretary in the Federal Register, to be the amount for which a standard vessel of such type could have been constructed (without its national defense features) in the United States under normal conditions relating to labor, materials, and other elements of cost, obtaining on or about January 1, 1941. In no case shall the prewar domestic cost of any type of vessel be considered to be greater than 80 per centum of the domestic war cost of vessels of the same type.

(d) "Statutory sales price", as applied to a particular vessel, means, in the case of a dry-cargo vessel, an amount equal to 50 per centum of the prewar domestic cost of that type of vessel, and in the case of a tanker, such term means an amount equal to 87½ per centum of the prewar domestic cost of a tanker of that type, such amount in each case being adjusted as follows:

(1) If the Secretary is of the opinion that the vessel is not in class, there shall

be subtracted the amount estimated by the Secretary as the cost of putting the vessel in class.

(2) If the Secretary is of the opinion that the vessel lacks desirable features which are incorporated in the standard vessel used for the purpose of determining prewar domestic cost, and that the statutory sales price (unadjusted) would be lower if the standard vessel had also lacked such features, there shall be subtracted the amount estimated by the Secretary as the amount of such resulting difference in statutory sales price.

(3) If the Secretary is of the opinion that the vessel contains desirable features which are not incorporated in the standard vessel used for the purpose of determining prewar domestic cost, and that the statutory sales price (unadjusted) would be higher if the standard vessel had also contained such features, there shall be added the amount estimated by the Secretary as the amount of such resulting difference in statutory sales price.

(4) There shall be subtracted, as representing normal depreciation, an amount computed by applying to the statutory sales price (determined without regard to this paragraph) the rate of 5 per centum per annum for the period beginning with the date of the original delivery of the vessel by its builder and ending with the date of sale or charter to the applicant in question, and there shall also be subtracted an amount computed by applying to the statutory sales price (determined without regard to this paragraph) such rate not in excess of 3 per centum per annum in the case of a vessel other than a tanker, and not in ex-

cess of 4 per centum per annum in the case of a tanker, for such period or periods of war service as the Secretary determines will make reasonable allowance for excessive wear and tear by reason of war service which cannot be or has not been otherwise compensated for under this subsection.

No adjustment, except in respect of passenger vessels constructed before January 1, 1941, shall be made under this Act which will result in a statutory sales price which (1) in the case of dry-cargo vessels (except Liberty type vessels) will be less than 35 per centum of the domestic war cost of vessels of the same type, (2) in the case of any Liberty type vessel will be less than 31½ per centum of the domestic war cost of vessels of such type, or (3) in the case of a tanker will be less than 50 per centum of the domestic war cost of tankers of the same type. For the purposes of this Act, except section 5, all Liberty vessels shall be considered to be vessels of one and the same type.

(e) "Domestic war cost" as applied to any type of vessel means the average construction cost (without national defense features) as determined by the Secretary, of vessels of such type delivered during the calendar year 1944, except in case of any type of vessel the principal deliveries of which were made after the calendar year 1944, there shall be used in lieu of such year 1944 such period of not less than six consecutive calendar months as the Secretary shall find to be most representative of war production costs of such type.

* * * * *

Sec. 4. (a) Any citizen of the United States may make application to the Secretary to purchase a war-built vessel, under the jurisdiction and control of the Secretary, at the statutory sales price. If the Secretary determines that the applicant possesses the ability, experience, financial resources, and other qualifications, necessary to enable him to operate and maintain the vessel under normal competitive conditions, and that such sale will aid in carrying out the policies of this Act, the Secretary shall sell such vessel to the applicant at the statutory sales price.

(b) At the time of sale, the purchaser shall pay to the Secretary at least 25 per centum of the statutory sales price. The balance of the statutory sales price shall be payable in not more than twenty equal annual installments, with interest on the portion of the statutory sales price remaining unpaid, at the rate of 3½ per centum per annum, or shall be payable under such other amortization provisions which permit the purchaser to accelerate payment of the unpaid balance as the Secretary deems satisfactory. The obligation of the purchaser with respect to payment of such unpaid balance with interest shall be secured by a preferred mortgage on the vessel sold.

(c) The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the lawful or proper use or operation of the vessel.

APPENDIX B

The opinion of the Court of Claims is as follows:

In the United States Court of Claims

(Decided November 3, 1953)

No. 50296

SOUTHEASTERN OIL FLORIDA, INC., v. THE UNITED STATES

No. 117–52

PACO TANKERS, INC., v. THE UNITED STATES

Mr. J. Franklin Fort for the plaintiffs. *Messrs. Radner, Zito, Kominers & Fort* and *Mr. Robert V. Faragher* were on the briefs.

Mr. Ernest C. Baynard, with whom was *Mr. Assistant Attorney General Warren E. Burger,* for the defendant.

ON PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

MADDEN, *Judge,* delivered the opinion of the court:

The plaintiff, Southeastern, purchased the type T2–SE–A1 tanker *Kern Hills*

from the former United States Maritime Commission on January 27, 1948, under a contract dated January 14, 1948. The plaintiff, Paco, purchased the type T2–SE–A1 type tanker *SS. Northfield* from the Commission in May 1948. In each case the Maritime Administrator, the successor to the Maritime Commission, in determining the ultimate purchase price of the vessels, charged the purchaser with the cost of "slotting and strapping" the vessels. The plaintiffs contend that they should not have been so charged, and sue to recover the amounts charged.

Until a few years before World War II, the steel plates of vessels were joined by overlapping and riveting. During the early years of the war, the all-welded method of construction was much used. The welded seams had the advantage of being leak proof, and the welding process was more rapid than the riveting process. But the resulting structure was rigid, too rigid to withstand the strains. Some of these vessels developed cracks which, once started, would spread from plate to plate throughout the vessel. Some welded Liberty ships and at least one welded T2 tanker broke in two. The slotting and strapping device was brought forward to correct the defects in welded ships. Four longitudinal slots, each about two hundred feet long, were cut in the midsection of the hull of the vessels. These slots were then covered with steel straps riveted to the plates of the ship. The straps applied to the T2 type tankers weighed about eighteen tons for each ship.

The sales by the Commission to the plaintiff were made under the Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended, 62 Stat. 1199; 50 App. U. S. C. 1735 ff.

The scheme and purpose of that statute are discussed in detail in our decision in *A. H. Bull Steamship Co.* v. *United States,* 123 C. Cls. 520, and *Southeastern Oil Delaware, Inc.* v. *United States,* 124 C. Cls. 561, and will not be treated extensively here. The Act provided that the Commission's surplus merchant ships should be sold to qualified operators at prices to be fixed by a statutory formula for each type of ship, with certain permissible variations from that formula. One of the permissible bases for an increase in the price of a particular ship was the presence of "desirable features" on that ship, which features were not present on the standard ship of that type.

By the time the tankers involved in this suit were sold to the plaintiffs, the defects in the all-welded ships had been discovered, and such ships could not be licensed for operation unless they had been so strengthened. In the language of the industry, such a ship would not be "in class" unless it was so strengthened. The Ship Sales Act required that each ship sold be put "in class" by the Commission, or that the purchaser be allowed a reduction in the purchase price sufficient to pay for putting the ship in class.

Before the plaintiffs, in 1947, applied to the Commission to purchase the tankers which they ultimately received, the Commission had decided to grant to purchasers an allowance on the purchase price to compensate for the cost of slotting and strapping. The statute required the Commission to do this, since without this strengthening the vessels would not be in class. But what the Commission granted with one hand, it took back with the other. For it inserted

a provision in the contract of sale that the slotting and strapping should be regarded as a "desirable feature," the cost of which should be added to the standard price of the ship. It required a deposit of an amount tentatively determined to be that prospective cost and later adjusted that amount, in the case of each of the ships to $16,600.

The plaintiffs protested the inclusion of this provision in their contracts, and the collection of the money from them. But they signed the contracts and accepted the ships. In their memoranda in support of their motions for summary judgment they have made an extensive argument that slotting and strapping was not a "desirable feature" within the meaning of the statute, and could not lawfully be charged for as such. The Government now concedes that the plaintiffs are right, on this point. But, the Government argues, the Commission reached substantially the right result, though it followed the wrong road to reach that result.

The Government now urges that the cost of slotting and strapping should be added to the price of the standard T2 tanker, in determining the statutory sale price, since such tankers, without this strengthening, were found to be inoperable. It recognizes that the statutory sale price was fixed, as the statute required, on the basis of the pre-war cost and the wartime cost of this type of ship; that, as so fixed, it included no amount for slotting and strapping, since no such work was done when the vessels were built. But, it says, no vessel can be a standard vessel unless it is operable, that is, in class, and none of the several hundred T2 tankers could be in class with-

out slotting and strapping, therefore the standard T2 tanker is one that is slotted and strapped, and the cost of doing so is a part of the cost of a standard T2 tanker. It says that it could have, when slotting and strapping became a class requirement in 1947, repriced the standard T2 and published the new price in the Federal Register as the statute required; that it did not do so because the plaintiffs, though under protest, signed the contracts of purchase agreeing to pay for the slotting and strapping as a desirable feature, and that the plaintiffs are estopped from now raising the question of noncompliance with the statutory requirement of publication.

The plaintiffs point out that the T2 tankers, when built in 1944, were in class and operable; that they were the standard vessel of that type and their cost as built was the cost which the Commission was required to find and use, and which it did use in computing the statutory sales price; that such tankers were sold for that price before May 1947, when slotting and strapping was made a legal requirement to put such vessels in class; that the tendency to crack was merely a defect which had to be repaired in order to put them in class, and that the Ship Sales Act required the Commission to do that at the expense of the Government, either by payment for it, or reduction in the purchase price. The plaintiffs say that the statutory pricing formula requires that adjustments in the sales price for class work shall always be downward. Section 3 (d) (1) says, "If the Commission is of the opinion that the vessel is not in class, there shall be subtracted the amount estimated by the Commission as the cost of putting the vessel in class."

Other statutory references to the cost of class work similarly refer to reductions or allowances in the sales price. The only statutory authorization for an increase in price is Section 3 (d) (1) relating to desirable features, and the Government does not now contend that slotting and strapping added a desirable feature.

We think that the Government's present contention for, in effect, redefining the standard T2 tanker as if it had been, when built, slotted and strapped, and adding the cost of that work to its cost, is not sound. These vessels were built and put in operation as standard, operable vessels. They developed defects. The only difference between their defects and those which occur in all vessels is that the defect here in controversy existed in all of them, instead of only in one or several. But, the defects having been discovered, the policy of the statute was that the defects should be repaired so that the ships could be operated. The repairs, to make Government ships operable and salable, were, the statute says, to be made at the expense of the Government.

If, in the light of the disclosed defect, such ships were again being built, they would, no doubt, be built differently. But whether the standard ship would avoid the defect by being slotted and strapped, or in some other way, we can only conjecture. As to the ships here in question, they started out as standard ships of their type, they developed defects, and the defects had to be fixed to make them operable and salable. That fixing was, we think, under the statute, to be done at the expense of the Government.

As to the Government's argument that the plaintiffs are estopped from asserting rights given them by the statute, because they signed contracts, though under protest, agreeing to treat slotting and strapping as a desirable feature, which the Government now concedes it was not, we considered a similar contention in *A. H. Bull Steamship Company* v. *United States,* 123 C. Cls. 520, at page 528. We said that the parties could not, by contract, change the terms prescribed by the statute for the sale of the ships.

We conclude that the Government was not entitled to collect from the plaintiffs any amount for slotting and strapping the tankers, and that each plaintiff may recover the amount so collected from it.

SOUTHEASTERN'S CLAIM FOR REPAIR CHARGES

Paragraph IV of Exhibit A of the contract of purchase under which Southeastern acquired the tanker *Kern Hills* contained the following language:

"* * * IV. Repairs. The Buyer, at the time of delivery of the vessel(s) by the Commission to the buyer, shall pay to the Commission, the cost to the Commission, as determined by the Commission, of certain repairs as follows:

"(a) Vessel(s) operating and not recently withdrawn from lay-up:

"*Kern Hills*

"Repairs made on the vessel(s) by or for the Commission, subsequent to July 1, 1947, up to the class date (including repairs in hand on such date) to the extent that such repairs are in excess of the work which

would have been performed by the Commission had it been preparing the vessel(s) for sale in accordance with its policy relating to class sales to American citizens for American flag operation, less the sum of $6,000 per vessel per month for each calendar month (or portion thereof in excess of 15 days) after completion of such repairs, during which the vessel(s) shall have been operated by or for the Commission subsequent to July 1, 1947. * * *"

Pursuant to this provision of the contract, the Government required Southeastern to deposit $21,781 at the time it acquired the ship. When the liability was finally computed, the Government returned all but $5,116.79 of this amount. Southeastern sues for the $5,116.79.

The vessel *Kern Hills* was not in the laid-up fleet, but was and had been in service for the Government, being operated by a general agent under a cost-plus contract. In applying the above provision of the contract, the Commission listed all repair expenditures which had been made on the ship from July 1, 1947, to the date of sale to Southeastern in January 1948. Then the Maintenance and Repair Division of the Commission analyzed the list and eliminated those items which would have had to be done to put the vessel in class, according to the class requirements at the time the repairs were made. The sum of the items not thus eliminated was charged to the plaintiff, Southeastern, it was given the $6,000 per month credit, and the ultimate charge of $5,116.79 was thus arrived at.

The plaintiff, Southeastern, says that there was no authority given to the Commission by the Ship Sales Act to make this charge, or to require purchasers of ships to agree to it. The Government points to no provision of the statute authorizing the charge. It urges, however, that the charge was fair because otherwise the purchaser of a ship which was in operation would get a ship on which the Government had made expenditures not necessary to put the ship in class, and would get the use of the ship more promptly than if he took a ship from the laid-up fleet.

The repairs charged to the plaintiff included some items that were not required to put the ship in class at the time the repairs were made, but were, because the class standards had been raised, necessary to put the ship in class at the time it was sold to the plaintiff. As to those, it would seem that if it had not been for this provision of the contract, they would have had to be done at Government expense. Other items, such as adjusting compasses and cleaning boilers, done some months before the ship was sold to the plaintiff, would seem to have been recurring expenses, of no permanent benefit to the ship.

The Government says that by Public Law 269, 61 Stat. 585, 603, amending the Ship Sales Act in July 1947, the Commission had been denied authority to perform work on vessels "to be sold" and that, therefore, if it had not recouped the cost of repairs made after that date, it would have violated this law. Before Public Law 269, the Commission had been putting vessels in class at its expense out of appropriated funds. After Public Law 269, the Commission had no appropriated funds for that purpose;

hence, it gave allowances to purchasers of the cost of putting the vessels in class. The change was a bookkeeping change, having no ultimate effect on the Government's finances. The Commission was not forbidden to operate vessels, nor to keep them in repair so that they would operate. The revenues which it derived from operation were a revolving fund available to the Commission.

We think that the repairs provision, inserted in the contract by the Commission, was not authorized by the Ship Sales Act. That Act provided in detail how the sales price was to be computed and what charges and credits were to be allowed to purchasers. Congress knew that there were hundreds of ships to be sold, some laid up and some operating. It knew that, apart from matters adjustable under the provisions of the statute relating to desirable features, and to the cost of putting vessels in class, which matters the Commission was authorized to consider in setting prices, there would be great differences in the condition of different ships, with regard to the condition of paint, the cleanness of boilers, the adjustment of compasses, etc. If such matters were to be allowed to affect the sales prices of ships, Congress might just as well have lodged complete discretion in the Commission to set the price of ships. But neither Congress nor the Commission was willing that that should be done. So Congress laid down the formula, and, we think, showed thereby that other items not included in the formula should be disregarded.

Our conclusion is that the repair charges with which the plaintiff, Southeastern, was charged were not authorized by the stat-

utes. We think that the contract provision purporting to authorize them was void, for the reasons already given.

The plaintiffs' motions for summary judgments are granted. The plaintiff, Southeastern, may have a judgment for $21,716.79. The plaintiff, Paco, may have a judgment for $16,600.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

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No. 247

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, *Petitioner*

v.

SOUTHEASTERN OIL FLORIDA, INC., and
PACO TANKERS, INC.

On Petition for Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. B, pp. 31-41) is reported at 119 F. Supp. 731.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTE INVOLVED

The relevant portions of the Merchant Ship Sales Act of 1946 are set forth in the petition (App. A, pp. 27-30), with the exception of Section 2, which is set forth in Appendix A hereto, p. 22.

QUESTION PRESENTED

The four questions framed by petitioner are unnecessarily complex, being addressed to types of legislation and proceedings not here involved.

The only question is whether a Government agency, which has been directed by an Act of Congress to sell Government-owned surplus vessels at a price to be determined in accordance with a fixed formula, may change the formula so as to increase the price; and whether a buyer who has signed, under protest, a purchase contract containing a provision so increasing the price, may recover in the Court of Claims the amount of the increase which he has paid.

STATEMENT

Respondents each purchased a T2-SE-A1 type tank vessel ("T-2") from the U. S. Maritime Commission in 1948 under the Merchant Ship Sales Act of 1946 ("the Act"), which governed the disposition of the Government's war-built merchant fleet after World War II. In general, the Act required the Commission to select a "standard" vessel for each type; to determine a "statutory sales price" for that standard vessel; and then, in selling individual vessels of such type, to make prescribed adjustments in the "statutory sales price" in accordance with a fixed formula (Sections 3(c) and (d)). In making each sale, the Commission was *directed* by the Act to sell at the "statutory sales price" (as so adjusted) (Section 4(a)). In 1946, about two years before the purchases in question, the Commission selected the standard vessel of the T-2 type and determined its unadjusted statutory sales price at $2,026,500 (Pet. 6).

Slotting and Strapping Charges

Respondents' purchase contracts contained (1) a provition for a deduction from the statutory sales price equal to the cost of all "class" repairs, including expressly an installation known as "slotting and strapping"[1] (sometimes called "strengthening," and hereinafter called "strapping") (R. 16-17, 45), and (2) a provision that, since the Commission would make a deduction for the cost of strapping, the vessel should "be considered as having an additional desirable feature within the meaning of clause (3) of Section 3(d) of the Act," for which the buyer was to pay an amount to be determined by the Commission (R. 18, 46). The full text of the contract provision is contained in Appendix B hereto, p. 22.

Respondents protested the insertion of this latter provition (as had previous buyers), claiming that under the Act no charge could be made for strapping (Pet. 8, R. 114, 156, 178, 211). Despite these protests, the Commission insisted upon the provision and, in accordance therewith, respondents made deposits of $28,875 for each of the vessels at the time of their delivery. Three years later, in June, 1951, after demands by respondents for refund of the entire deposits, the Commission determined the charge for strapping to be $16,600, and returned the balance of the deposits (R. 115, 157-60, 179).

Respondents sued below to recover the $16,600 withheld, contending that:

(a) Strapping was not a "desirable feature" in fact, or as a matter of law under Section 3(d)(3) of the Act.

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[1] "Class" repairs were those necessary to place a vessel in legally operable condition (Pet. 5, n. 3). Petitioner admits that the Act required a deduction from the purchase price for all "class" repairs, and that strapping was a "class" requirement when respondents purchased their vessels. (Pet. 5, 7).

(b) The contract clause treating strapping as if it were a "desirable feature" was invalid.[2]

(c) Since strapping was a "class" repair, the Commission was required, under the Act, to absorb its cost and could not avoid this obligation by also treating strapping as a "desirable feature"—the two being mutually exclusive.

In the court below, respondents established an uncontested factual record that strapping was thoroughly undesirable—being a makeshift device installed in 1947 and 1948 on T-2 tankers several years after construction to arrest complete fractures which had occurred in some T-2's because of defective design, steel, and welding (R. 70-80, 115-17, 119-20, 176-78, 180). Strapping consisted of cutting four slots, approximately 200 feet in length, in the midsection of the hull (two on the bottom and two on the deck); and then riveting four steel straps, weighing approximately 18 tons, over the slots. Respondents demonstrated that strapping added to vessel maintenance costs, increased leakage and risk of contamination of cargo, and reduced cargo-carrying capacity (R. 73-74, 116, 119-20, 177-78). They also showed that the 1947 strapping did not remedy the defect, and that further straps, etc., became a class requirement in 1952. These weighed over 100 tons and cost respondents over $100,000 per vessel (R. 117, 180).

Respondents also established that it was the consistent administrative practice of the Maritime Commission to absorb the cost of all class work, including work affecting all vessels of a particular type, with the single exception of

[2] Respondent Paco also contended that under a proper interpretation of its contract, and even if the contract clause treating strapping as a "desirable feature" were valid, no charge whatever was authorized (R. 171-74). Its vessel was purchased at "floor" under the Ship Sales Act, and the adjustments required by the statutory pricing formula under the uncontested lower court decision in *A. H. Bull Steamship Co.* v. *United States*, 123 Ct. Cl. 520, 108 F. Supp. 95, served to eliminate any charge whatsoever.

strapping (R. 87, 261); and that the Commission's own repair division had pointed out that strapping was a class requirement, and in no sense an improvement or betterment (R. 76-77, 245-46).

Respondents also showed that the term "desirable features" had reference to features of commercial utility such as extra cargo handling equipment, refrigeration, additional speed and increased cargo capacity (R. 79, 80).

No effort whatever was made by petitioner in the court below to contravert these facts. It concurred in the material facts (R. 194-95). *And further, petitioner conceded the principal point made by respondents, namely, that strapping was not a "desirable feature," within the meaning of the Act* (R. 215-16, 218, 381-84). The lower court so found (Pet. 34, 119 F. Supp. at 733).

After making this concession,[3] petitioner shifted to a new theory, that the Maritime Commission, at the time strapping became a class requirement in 1947, might have established a new type of T-2 tanker, selected a new standard vessel of that type and increased the statutory sales price to reflect the cost of strapping—not, however, by $16,600 per vessel as determined by the Commission, but as to respondent Southeastern, by $14,730, and as to respondent Paco, by $12,000 (R. 209-11, 219, 229). Petitioner further contended that the Maritime Commission was misled into not retyping the T-2 by respondents' action in executing contracts containing the provision that strapping was to be treated as a desirable feature; and, from such premise, argued that respondents were equitably estopped to deny the validity of the contract provision (R. 213-14).

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[3] On motion for rehearing, petitioner, among other points, claimed that the concession had been erroneously attributed to it (R. 340-1). But petitioner submitted no affidavit or other evidence, to overcome the basis of the concession, which is reviewed in respondents' brief in opposition to motion for rehearing (R. 381-4).

Respondents demonstrated that even if the Commission were misled, which was not established by petitioner, the point was immaterial because it would have been contrary to the Act to establish a new type of T-2 tanker.[4] The court below agreed with respondents, holding that the Act contained a direction by Congress that the cost of placing vessels "in class" (i.e., in condition to operate in accordance with law) was to be deducted from the statutory sales price, and that no part of this cost could lawfully be charged back to respondents under petitioner's new theory, or otherwise (Pet. 36, 119 F. Supp. at 733, 734).

Repair Charges

The purchase contract with respondent Southeastern also contained a provision (R. 18-20) requiring it to pay the cost of certain routine maintenance repairs made to the vessel during a period of six months before Southeastern contracted to purchase the vessel. During that period the Maritime Commission was operating the vessel commercially on a profitable basis and retained the vessel's earnings (R. 95).

Southeastern protested this provision as being contrary to the Act (R. 156), but the Commission insisted upon it, and Southeastern deposited $21,781. The Commission subsequently determined the amount of the charges to be $5,116.79 and returned the balance.

Petitioner cited no provision in the statutory pricing formula in support of the charges. The court below held that they were not authorized, and that the contract provision relating thereto was invalid, stating:

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[4] Respondents pointed out that the strapping requirement was intended simply to remedy a defect in the hull of the vessel, and that it did not change either the type of the vessel or the existing standard vessel (R. 259-66, 316-20). Respondents also showed the absurd results which would follow if a new type of vessel were created each time a defect in the vessel was discovered. It would have meant, for example, that the statutory price would be higher for a defective vessel requiring class repairs, than for a vessel having no defects (R. 269-70).

"... Congress knew that there were hundreds of ships to be sold, some laid up and some operating. It knew that ... there would be great differences in the condition of different ships, with regard to the condition of paint, the cleanness of boilers, the adjustment of compasses, etc. If such matters were to be allowed to affect the sales prices of ships, Congress might just as well have lodged complete discretion in the Commission to set the price of ships. But neither Congress nor the Commission was willing that that should be done. So Congress laid down the formula, and, we think, showed thereby that other items not included in the formula should be disregarded." (Pet. 40, 119 F. Supp. at 735)

ARGUMENT

The petition mistakenly ascribes to this case broad issues of general importance and potential widespread impact. It ignores altogether the special character of Sections 3 and 4 of the Act, which contained a direction by Congress to sell ships to qualified purchasers upon fixed statutory terms. Instead, petitioner proceeds upon the erroneous assumption that Congress left to the Maritime Commission broad discretion in setting prices. At the same time, petitioner overlooks that the declared policy of the statute was to restore the American Merchant Marine, of which respondents are a part, to peacetime commercial status.

To show that the case is not one warranting review by this Court, respondents will deal with four points:

1. Sections 3 and 4 of the Act prescribed a mandatory pricing formula for the sale of the vessels, conferred rights to purchase in accordance with such formula, and precluded the Commission from substituting its judgment for that of Congress as respects price.

2. Because of the mandatory character of the statutory pricing formula, and the buyers' protests, there is no waiver or estoppel.

3. The jurisdiction of the Court of Claims is not open to question under a proper construction of the statutory provisions involved.

4. The decision of the court below, in addition to being correct, concerns only a narrow issue under an expired statute. The decision does not, as petitioner urges, have any broad effect either under that statute, or under other legislation dealing with procurement or disposal of Government property.

1. Mandatory Character of the Act.

The Ship Sales Act was intended to establish a firm pricing basis for the transfer to qualified shipping companies of the Government's war-built merchant fleet, thereby aiding in carrying out the declared policy of the Act (Section 2), which was "to foster the development and encourage the maintenance" of a healthy, seaworthy, vigorous, and privately-owned American Merchant Marine. Experience under the ship disposal legislation enacted after World War I, which contained "no statutory price," had demonstrated the need for a firm pricing formula. (H. Rept. No. 831, 79th Cong., 1st Sess. (1945), p. 2.)

The mandatory character of the legislation is plainly shown by Section 4(a) of the Act:

> "Sec. 4. (a) Any citizen of the United States may make application to the Commission to purchase a war-built vessel, under the jurisdiction and control of the Commission, at the statutory sales price. If the Commission determines that the applicant possesses the ability, experience, financial resources, and other qualifications, necessary to enable him to operate and maintain the vessel under normal competitive conditions, and that such sale will aid in carrying out the policies of this Act, *the Commission shall sell such vessel to the applicant at the statutory sales price.*" [5]

By this provision the Commission was *directed* to sell "at the statutory sales price." Section 3 of the Act told the Commission how the "statutory sales price" should be computed and specified certain adjustments therein. One

[5] Emphasis added in this and later quotations unless otherwise indicated.

of these adjustments was a deduction for the cost of placing the vessels in class, and petitioner admits that strapping was a class requirement (Pet. 7). The only upward adjustment authorized was for "desirable features" (Section 3(d)(3)), and as pointed out (*supra*, p. 5), petitioner conceded in the court below that strapping did not fall in this category. There was no basis whatever in the pricing formula for the repair charges made against respondent Southeastern.

The legislative history of the Act, excerpts from which are contained in Appendix B hereto, confirms beyond any doubt (a) the mandatory character of the statutory pricing formula, (b) the intent of Congress that qualified shipping companies should have a *right* to purchase at the price fixed by Congress, (c) the required downward adjustment in price for the cost of class work, and (d) the intended distinction between class repairs and desirable features.

Two examples from the legislative history are representative. The Senate Committee Report stated the proposition as follows:

> ". . . Only Congress can lay down the necessary standards and directions for the orderly disposition of the war-built fleet, in order that there may be established and maintained a healthy and vigorous post-war American merchant marine in the interest of world-wide peaceful commerce, in the interest of national security, and in order that those having the direct responsibility of administration may be guided and controlled by standards acceptable to the Congress speaking in the public interest." (S. Rept. No. 807, 79th Cong., 1st Sess. (1945), p. 2.)

Similarly, the House Committee Report stated that any qualified applicant was "*entitled* to purchase a war-built vessel from the Commission at the statutory sales price," if the Commission determined that the sale would carry out the policies of the Act; and that the statutory sales price was "a fixed price." (H. Rep. No. 831, 79th Cong., 1st Sess. (1945), p. 8.)

This Court has on numerous occasions made clear that administrative agencies may not take action outside of the Congressional grant of authority; that where they do so, they are invading the field of the Legislature;[6] and that Congress alone can prescribe the terms for the disposition of Government property.[7] Under a statute of the type here involved the administrative agency could not alter the pricing formula of the Act.

In the face of the positive character of the pricing provisions of the Act, petitioner's arguments slip off in irrelevant directions. Petitioner first argues that the Act conferred no judicially enforceable rights upon respondents to buy upon the statutory terms (Pet. 15, 16), relying upon *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *United States* v. *New York P. R. S. S. Co.*, 239 U. S. 88, and *Goldberg* v. *Daniels*, 231 U. S. 218. But these cases are not remotely in point. The first two involved statutes enacted exclusively for the benefit of persons other than the litigants who sought to invoke them. The *Perkins* case held that a *prospective* bidder was without standing to enjoin a regulation of the Secretary of Labor relating to minimum wages to be paid by Government contractors. The *New York*

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[6] *Koshland* v. *Helvering*, 298 U.S. 441, 446, 447; *Manhattan G. E. Co.* v. *Commissioner of Int. Rev.*, 297 U.S. 129, 134, 135; *Miller* v. *United States*, 294 U.S. 435, 439, 440; *Campbell* v. *Galeno Chemical Co.*, 281 U.S. 599, 609, 610; *Lynch* v. *Tilden Produce Co.*, 265 U.S. 315, 321, 322; *International Ry. Co.* v. *Davidson*, 257 U.S. 506; *United States* v. *Laughlin*, 249 U.S. 440, 443; *United States* v. *United Verde Copper Co.*, 196 U.S. 207; *Campbell and Thayer* v. *United States*, 107 U.S. 407; *Morrill* v. *Jones*, 106 U.S. 466.

[7] U.S. Const., Art. 4, § 3, cl. 2; *United States* v. *California*, 332 U.S. 19, 27; *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 294; *United States* v. *San Francisco*, 310 U.S. 16, 29, 30; *Light* v. *United States*, 220 U.S. 523, 537; *Butte City Water Co.* v. *Baker*, 196 U.S. 119, 126; *United States* v. *Nicoll*, 27 Fed. Cas. 149 (N.Y., 1826). In the *California* case, the Court said (p. 27): "Thus neither the courts nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power."

P. R. S. S. Co. case held that the Government could recover upon a contract not executed with the formalities required by statute, since the formalities were solely for its protection. The *Goldberg* case held that mandamus would not lie against a Government official to compel the delivery of property claimed by the low competitive bidder, whose bid had not been accepted, because the action was, in effect, against the United States which had not consented to be so sued.

In this case, the Act conferred specific rights upon respondents to buy on the statutory terms. Petitioner's argument contradicts the declared policy of the Act, which was to restore the American Merchant Marine, of which respondents are a part. In *United States* v. *Laughlin*, 249 U. S. 440, a case closely parallel to the present one, this Court, in upholding recovery in the Court of Claims of an amount paid for public land in excess of the minimum price set by statute, said (p. 447), ". . . a qualified pre-emptor was entitled to purchase at the minimum price. This was a substantial right, of which he could not be deprived by arbitrary action of the officers of the government." In *Work* v. *United States, etc.*, 262 U. S. 200, a lessee of Government lands was held to have a right to purchase such lands at the price fixed by statute. Cf. *Hunter* v. *Anderson*, 74 F. Supp. 721 (D. C. Tex., 1947).

Petitioner next argues, in substance, that since disposal legislation customarily confers broad discretion upon the selling agency, the same must be true of the Ship Sales Act (Pet. 17-19). But none of the cases cited by petitioner has any relevance to the type of legislation or situation here presented.[8]

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[8] *Goldberg* v. *Daniels*, 231 U.S. 218, and *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, held that specific relief (mandamus, in the former—an injunction, in the latter) could not be obtained against a Government officer with respect to property claimed under a Government contract, since the suit was, in effect, against the United States, which had not consented to be sued. In the *Larson* case, the Court clearly distinguished an injunctive proceeding from a suit for damages (p. 704), and in fact stated that the

In dealing directly with the Act, petitioner, although acknowledging the "seeming specificity" of the pricing provisions, argues that nonetheless broad discretion was lodged in the Maritime Commission (Pet. 18). But this case does not involve any of the instances of discretion vested in the Commission. Respondents are not questioning the selection of the "standard vessel" which was made in 1946, or the computation of the "statutory sales price" (apart from the prescribed adjustments) which petitioner says involves the "appraisal of many complex industrial factors." The qualifications of respondents as purchasers are not in issue, because the Commission had made this determination in their favor before the purchase contracts were signed. The Commission had also found that the sales to them would aid in carrying out the policies of the Act. And, as for the legal issue of what were "desirable features," within the meaning of Section 3(d)(3) of the Act, petitioner's concession in the court below that strapping was not a "desirable feature" (contrary to the Commission's earlier conclusion that strapping could be treated as a desirable feature) was a direct repudiation of the Commission's alleged "expertise" to which petitioner now refers (Pet. 19).

Finally, petitioner challenges the action of the court below, first, as an improper substitution of its construction of the Act for that of the parties (Pet. 17), and, second, as a usurpation of the administrative discretion of the Commission (Pet. 22, 23).

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plaintiff admittedly had a remedy in the Court of Claims (p. 703, n. 27). *United States ex rel Dunlap* v. *Black*, 128 U.S. 40, held only that mandamus would not lie to correct a Government officer's interpretation of a statute which authorized him to exercise discretion or judgment. In neither *Gilbert & Secor* v. *United States*, 8 Wall. 358, nor *Matson Navigation Co.* v. *United States*, 284 U.S. 352, were the contracts involved contrary to the terms of any statute. In the latter case, the company had the option to accept the charter terms or sue for "just compensation," and chose the former. Indeed, it was not objecting to the charter terms, the only issue being jurisdictional, i.e. as to whether a "maritime" cause of action was involved.

As for the first, the court obviously did not substitute its construction for that of the parties. On the contrary, respondents had protested the Commission's construction, and the court simply sustained their construction. Necessarily, where a claim is "founded upon" an Act of Congress, as here, the court must interpret the law.[9] That is the function of the court.

The second point is somewhat obscure. Petitioner seems to suggest that the contract clauses relating to the strapping and repair charges could be found invalid only under circumstances where the Commission would thereafter be afforded an opportunity to consider a second time whether it would sell to respondents or to others (without making these invalid charges), or withhold the vessels from sale; and that the decision of the court below is wrong because it has the effect of denying that opportunity to the Commission. The argument becomes complicated by the fact that Congress has withdrawn the power of sale under the Act.

Petitioner's suggestion, coupled with its reliance upon *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17 and *United States* v. *Jones*, 336 U. S. 641,[10] again manifests a complete misunderstanding of the area of the Commission's discretion, and, in particular, the mandatory character of the pricing provisions of the Act. By prescribing how the selling price should be computed, Con-

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[9] For example, in *United States* v. *Laughlin*, 249 U.S. 440, the Court construed a number of statutory provisions in determining the price at which the buyer was entitled to purchase public land.

[10] In *Idaho Power Co.*, Congress had expressly lodged broad discretion in the FPC in licensing hydroelectric projects to insure that they would fit in with a comprehensive plan for the development of water power. In the *Jones* case, Congress had plainly conferred the rate-making power upon the Interstate Commerce Commission and did not want the courts to make the rates. But the rates were held reviewable for basic errors of law. Moreover, in *Idaho Power Co.*, the Court recognized that where an unconstitutional provision in a license is separable, it may be excised by a court (344 U.S. at p. 20).

gress removed that element from the Commission's discretion. The discretion which Congress reposed in the Commission was to determine whether the applicant was qualified and whether the sale to him would aid in carrying out the policy of the Act (*i.e.*, the welfare of the American Merchant Marine). Once the Commission made those determinations in respondents' favor, its discretion was exhausted. In awarding judgment to respondents, the court below merely interpreted what Congress had set as the selling price, and in no way invaded the administrative realm.

Petitioner's arguments also overlook entirely the strong public policy considerations in legislation of this type. If the Maritime Commission could have ignored the pricing formula in the Act and increased prices as it saw fit, the practical effect would have been to exclude from the group of otherwise qualified buyers, all who refused to consent to arbitrary agency action. Such a result would not only have been contrary to the express mandate of Congress, but might have placed the merchant fleet in the hands of the less qualified buyers, or in the hands of noncitizens, over whom citizen buyers were to have preference under the Act (see Section 6 of the Act).

An analogy is suggested by the cases dealing with appointment to public office, which uniformly hold that Government agencies cannot by *contract or otherwise* reduce the salary of an office fixed by statute and that an appointee, who by contract has agreed to accept less, may nevertheless recover the statutory salary.[11] In these cases, the Court has held that such arrangements might exclude from service those more qualified persons who would be willing to take office at the statutory salary but would not come for less.

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[11] *United States* v. *Andrews*, 240 U.S. 90; *Glavey* v. *United States*, 182 U.S. 595.

2. Waiver and Estoppel.

Petitioner's first point is that even assuming the Maritime Commission acted contrary to the express terms of the statute in requiring respondents to pay the strapping and repair charges, respondents nevertheless waived their statutory rights by executing the contracts and accepting the vessels (Pet. 20, 21). Petitioner's second point is that respondents are "equitably estopped" from contesting the invalid contract provisions, because by signing the contracts, respondents "may have" induced the Commission not to redefine the standard T-2 tanker, an alternative course of action which, it is claimed, would have been legal under the Act (Pet. 22).

The cases cited by petitioner in support of its first point are wholly irrelevant.[12] As has been shown, Congress intended that the vessels should be sold at the statutory

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[12] In *Matson Navigation Co.* v. *United States*, 284 U.S. 352, *American Smelting & Refining Co.* v. *United States*, 259 U.S. 75, *Gray* v. *Commodity Credit Corporation*, 159 F. 2d 243 (C.A. 9), and *Parish* v. *United States*, 8 Wall. 489, the contracts were not in conflict with the provisions of any statute. *United States* v. *San Francisco*, 310 U.S. 16, and *Fahey* v. *Mallonee*, 332 U.S. 245, are largely applications of the rule that this Court will not pass on the constitutionality of a statute at the instance of one who has availed himself of its benefits—a rule described by Mr. Justice Brandeis as one developed by this Court "for its own governance" to avoid unnecessarily passing upon constitutional questions. See *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-48. *Callanan Road Co.* v. *United States*, 345 U.S. 507, is merely an application of the doctrine that a party will not be permitted to assume contradictory positions with respect to the same matter in the same or successive proceedings. *Gibson* v. *Lyon*, 115 U.S. 439, is only an application of the doctrine of estoppel by deed as enforced in Pennsylvania (Cf. *In re Solomon*, 40 F. Supp. 62, 63 (E.D. Pa.)—a doctrine wholly irrelevant to any of the issues of this case. *Shutte* v. *Thompson*, 15 Wall. 151, simply holds that one will not be heard to raise a remediable procedural objection if he has knowingly waited until it is too late to cure the objection. Moreover, the contract provisions in this case, held by the court below to be contrary to the statute, are entirely separable from, and their invalidity cannot affect, the remainder of the contracts. *Merchants Cotton Press & Storage Co.* v. *Insurance Co. of North America*, 151 U.S. 368, 388; *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64; *Williston on Contracts* (Rev. Ed.) §§ 1779, 1780, 1782.

price; the challenged provisions were in clear violation of the statutory price; and respondents were entitled to purchase upon the statutory terms. Respondents are not attacking the validity of the statute, but are seeking only the intended benefits of the statute as prescribed by Congress, no more and no less. Respondents are only attacking a condition sought to be imposed by agency action which conflicts with a condition set down by the Legislature. The only practical solution at the time of purchase was for the buyers to sign the contracts under protest, reserving their rights for later judicial determination. The basic purpose of the Ship Sales Act would have been defeated if the only alternative available to qualified buyers was to refuse to purchase the vessels because of the invalid terms.

Respondents' protests to the invalid contract provisions, as well as the protests by the industry in general (R. 211-12), were not meaningless gestures, as suggested by petitioner (Pet. 21, n. 14, n. 15). On the contrary, these protests served to make clear that there was no waiver.[13]

Moreover, courts will not invoke waiver or estoppel to permit enforcement of contract provisions which are contrary to statute, particularly, where, as here (*supra*, p. 14), strong considerations of policy are involved.[14] For exam-

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[13] *Southern Pacific* v. *United States*, 268 U.S. 263, 269; *Swift & C. & B. Co.* v. *United States*, 111 U.S. 22. None of the cases cited by petitioner involved a contract contrary to any statute. The *Edmonston* case was an action to recover an overpayment for public land. The Court, in holding that the payment was *voluntary* and under a mutual mistake of law, which was not known by either party until after the sale, pointed out the absence of any objection or protest (pp. 501, 514, 515). And, in *American Smelting & Refining Co.*, the Court stated (p. 78) that if the plaintiff "had desired to stand upon its legal rights, it should have saved the question of the price. It did not do so, but, on the contrary, so far as appears, was willing to contract, and was content in the main with what was offered."

[14] *Snyder* v. *Buck*, 340 U.S. 15, 19; *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 706; *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356; *Awotin* v. *Atlas Exchange Bank*, 295 U.S. 209, 213; *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U.S. 245; *Pittsburgh, etc. Ry. Co.* v. *Fink*, 250 U.S. 577.

ple, this Court in *Glavey* v. *United States,* 182 U. S. 595, 609, quoted with approval the following from *Miller* v. *United States,* 103 Fed. 413, 416:

> " . . . And, if public policy prohibit such a bargain [an agreement by a public official to accept less than the statutory salary] in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel."

Petitioner's second point, that respondents are "equitably estopped" because the Commission "may have" been induced by respondents not to take an alternative course of action (retyping the T-2), which would have been unassailable under the Act, is equally unavailing. In the first place, respondents did not mislead the Maritime Commission. On the contrary, they objected to the inclusion of the illegal contract provisions. Moreover, the record shows plainly that when the strapping question was initially presented to the Commission, it took the position that a "desirable feature" charge could legally be made under the Act (R. 242-43). There is not the slightest indication in the record that the Commission was ever of the opinion that it would have had a right to retype the T-2 vessels. Secondly, and of greater significance, the alternative course of action which petitioner says the Maritime Commission was induced not to take would also have been contrary to the Act and therefore illegal (*supra,* p. 6).

Clearly, estoppel should not be applied here to permit the subversion of the plain terms of the Act and to subject respondents to a detriment. As this Court stated in *Dickerson* v. *Colgrove,* 100 U. S. 578, 580, the doctrine of equitable estoppel is applied so as "to promote the ends of justice." And, as Judge Hand observed in *Helvering* v. *Schine Chain Theatres,* 121 F. 2d 948, 950 (C. A. 2):

> ". . . there was no basis for an 'estoppel,' however broadly one uses that disastrous word. This is true because, however nebulous, it has always had at least

this solid centre; that the party who invokes it shall have acted to his detriment in reliance upon what the other party has done."

3. Jurisdiction.

Petitioner argues that the court below by accepting jurisdiction "has *sub silentio* in this case" abandoned the rule laid down by this Court in *United States* v. *Holland-America Lijn*, 254 U. S. 148 (Pet. 24). It also says that respondents' case has common issues with the case of *Clapp* v. *United States* (No. 248), in which petitioner has concurrently filed a petition for a writ of certiorari.

The injection of the jurisdiction issue in this case was an afterthought. It was not mentioned below in the answer, in petitioner's original brief, in oral argument, or in petitioner's supplemental brief filed after argument. The point was first suggested on motion for rehearing, but even there petitioner placed no stress on the *Holland-America* case, and made no effort to indicate its relevance. The principal point made on motion for rehearing was that respondents' claims were not "founded upon" an Act of Congress because the Ship Sales Act did not provide expressly for a refund of the strapping charge (R. 354-55, 361).[15]

Petitioner incorporates by reference the jurisdictional arguments it makes in the *Clapp* petition (Pet. 24). There it argues that *Holland-America* involved "a claim for dam-

[15] This point is not raised in the petition. The notion has been thoroughly dispelled that the statute upon which suit is brought must contain an *express* provision for refund or payment. See *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 30-32; *Dooley* v. *United States*, 182 U.S. 222; *Aycock-Lindsey Corp.* v. *United States*, 171 F. 2d 518, 520-1 (C.A. 5); *Compagnie General Transatlantique* v. *United States*, 21 F. 2d 465, 466 (S.D. N.Y.), aff'd. 26 F. 2d 195 (C.A. 2); cf. *Bell* v. *Hood*, 327 U.S. 678. *Baltimore Mail SS Co.* v. *United States*, 76 F. 2d 582 (C.A. 4), cert. den. 296 U.S. 595, cited by petitioner, has been construed as holding that courts have no jurisdiction under the Tucker Act over claims implied *in law*, cf. *Ross Packing Co.* v. *United States*, 42 F. Supp. 932, 936 (E.D. Wash).

ages sounding in tort" and is "on all fours" with the *Clapp* case (Clapp Pet. 17). No such contention is or can be made in the present case. The cases are wholly unalike. In *Holland-America*, certain charges were exacted from plaintiff for maintenance and medical care of aliens, under threat of detention of its vessels. The Court regarded the claim as one for damages for "the wrongful and *tortious* acts of officials of the United States government, acting without authority of law in *coercing* the claimant to pay the sums demanded" (254 U. S. at 153). Thus, the cause of action there was considered to have been founded in tort, and not to have been related to a claim "founded upon" an Act of Congress.

Petitioner further argues in the *Clapp* petition that the claim there was not "founded upon" an Act of Congress because the statute became an issue only as a matter of defense by the Government (Clapp Pet. 19, 20). Here, the rights which respondents seek to enforce are spelled out affirmatively in the Act and their claims are based squarely upon the Act. Jurisdiction of the Court of Claims over these claims is conferred by the second subdivision of 28 U.S.C. 1491.

A long line of Supreme Court and lower Federal Court decisions has firmly imbedded the principle that one may recover a money judgment against the United States where his rights derive from an Act of Congress.[16]

4. Scope of the Decision Below.

The decision below has no importance either to government disposal or acquisition contracts in general, or to problems arising under the Ship Sales Act.

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[16] *Dismuke* v. *United States*, 297 U.S. 167; *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 30-32; *United States* v. *Hvoslef*, 237 U.S. 1, 7-10; *Dooley* v. *United States*, 182 U.S. 222, 223-28; *United States* v. *McDonald*, 128 U.S. 471; *Beers* v. *FSA*, 172 F. 2d 34 (C.A. 2); *Christie-Street Commission Co.* v. *United States*, 136 F. 2d 326, 327-31 (C.A. 8); *Compagnie General Transatlantique* v. *United States*, (S.D. N.Y.) 21 F. 2d 465, 466 aff'd. 24 F. 2d 195 (C.A. 2).

The Ship Sales Act was legislation of a unique character, designed to accomplish the disposal of the Government's surplus merchant vessels of 1500 gross tons or over after World War II. The authority to sell expired on January 15, 1951 (Pet. 4, n. 2).

The decision below relates only to Sections 3 and 4 of the Act, which the court found to embrace a mandatory pricing formula and to confer rights upon respondents to buy upon terms according with that formula. The decision has no bearing on other types of disposal legislation not of the same mandatory and beneficial character. Petitioner has pointed to no other legislation, even remotely similar, in the field of government acquisition or disposition of property which might be affected by the decision below. The concern expressed by petitioner that the decision may "by implication" affect "the entire field of Government procurement and the disposal of Government property" (Pet. 14) is completely without justification, and yet is advanced as a principal reason for review of the case by this Court.

The issues decided by the court below are limited to only one type of vessel sold under the Act, only to vessels of that type sold to United States citizens, and only to a part of those sold to United States citizens. There is only a single type of "class" requirement involved—namely, strapping. Significantly, *it is the only type of class requirement in the entire ship sales program for which a desirable feature charge was asserted against purchasers* (R. 85-87, 245-46). The cost of all other types of class requirements was absorbed in full as a matter of course on vessels sold to citizens (R. 87, 261). Similarly, the repair charges made against respondent Southeastern were limited to tankers; and only to those sold after October 2, 1947, an arbitrary date (R. 94-98).

The relevance of the issues here to potential charter claims, which petitioner mentions, is not established—being wholly conjectural. This case involves the sales provisions of the Act (Sections 3 and 4), while any charter claims

would arise under the chartering provisions of the Act (Section 5), and certain sections of the Merchant Marine Act, 1936. The position of the Maritime Administration is that the charter terms involved are in accordance with Section 5. There is time enough to present issues concerning those terms to this Court when and if Section 5 is construed by the courts in a fashion which the Government considers erroneous. It is premature, in view of the many speculative considerations, to bring that section into this case as a reason for review.

Similarly, such issues as estoppel, waiver, discretion of administrative agencies, and the general authority of Government disposal or procurement agencies to contract on terms favorable to the Government, which petitioner raised both in the court below and here, have relevance only in connection with legislation lodging discretion in the administrative agency to set the terms upon which the Government will do business. In the light of the Act, as construed by the court below, these issues are not germane, and remain unaffected by its decision.

CONCLUSION.

Accordingly, this case has no relevance to government contracts generally. It involves only a narrow issue arising under a special type of disposal statute which has expired.

It is respectfully submitted, therefore, that the petition for writ of certiorari should be denied.

Respectfully submitted,

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September 10, 1954.

APPENDIX A

Declaration of Policy

Sec. 2. (a) It is necessary for the national security and development and maintenance of the domestic and the export and import foreign commerce of the United States that the United States have an efficient and adequate American-owned merchant marine (1) sufficient to carry its domestic water-borne commerce and a substantial portion of its water-borne export and import foreign commerce and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times; (2) capable of serving as a naval and military auxiliary in time of war or national emergency; (3) owned and operated under the United States flag by citizens of the United States; (4) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel; and (5) supplemented by efficient American-owned facilities for shipbuilding and ship repair, marine insurance, and other auxiliary services.

(b) It is hereby declared to be the policy of this Act to foster the development and encourage the maintenance of such a merchant marine.

APPENDIX B

"Any vessel of the T-2 type that is strengthened, or for the cost of strengthening which the Buyer has received an allowance as above indicated, shall be considered as having an additional desirable feature within the meaning of Clause (3) of Section 3(d) of the Act, and the Buyer shall pay for such additional desirable feature an amount determined by the Commission in accordance with subparagraph (5) of Section 299.1(f) of the Regulations. In the event the Commission has not determined said amount up to the time of delivery of the vessel, the Buyer shall deposit with the Commission the sum of $28,875 for each vessel to cover the payment for such additional desirable features, it being understood that when the Commission determines the amount chargeable to the Buyer, the above deposit will be adjusted upward or downward and payment will be made by the Buyer or by the Commission of the difference between the deposit and the cost of such additional desirable features."

APPENDIX C

Legislative History Showing (1) Mandatory Character of the Pricing Provisions of the Act; (2) The Rights of Qualified Applicants to Purchase; (3) The Requirement That the Cost of "Class" Work Be Absorbed by the Government; (4) The Distinction Between Class Repairs and Desirable Features.

Also Relevant Quotations From Previous Decisions of the Court Below Under the Ship Sales Act.

1. Mandatory Character of the Pricing Provisions of the Act.

"Mr. Speaker, the general purpose of the bill is obvious. *It is designed to establish in advance of sales certain statutory prices* for which merchant vessels constructed for or by the United States during the war period may be sold. Of course, a necessary correlative to the establishment of fixed prices for the various classes of vessels is to *limit quite completely the scope of discretion to be exercised* by the Maritime Commission in connection with these sales." (Statement of Representative Bonner, 92 Cong. Rec. 1642 (1946))

. . . "We fix a formula, we fix a standard, and that is subject in the case of each ship to definite modifications . . ." (Statement of Senator Radcliffe, 91 Cong. Rec. 11865 (1945))

"The House of Representatives gave this subject very careful study. The members of the Senate Committee on Commerce, which has devoted much time to the subject, realizing that we control the entire market came to the conclusion that instead of leaving the authority to sell in the hands of an administrative officer of the Government, with unlimited discretion, it would be better for the Government and better for the industry to attempt to fix a price and to provide that if the ships cannot be sold at that price they will be taken off the market." (Statement of Senator Radcliffe, 91 Cong. Rec. 11862-3 (1945)).

". . . In other words, if the Maritime Commission were allowed to sell ships in whatever way it saw fit, results might follow which would appall us. The Maritime Com-

mission does not want such blanket authority. It has been decided to lay down a formula by which the ships may be disposed of. . . ." (Statement of Senator Radcliffe, 91 Cong. Rec. 11883 (1945)).

"Then, in my view, this bill undertakes so to circumscribe the authority, so to limit the activities, and so to subordinate the judgment of the Maritime Commission with respect to what ships should be sold and the prices at which they should be sold that the purpose of the bill is defeated."

* * * * *

"But in the pending bill, by removing from the Maritime Commission the obligation to exercise discretion and responsibility, we are undertaking to substitute for its discretion and responsibility a statement of the terms and conditions under which such sales may be made and we are undertaking to establish the rigidity of law in place of the exercise of sound discretion by a regulatory body." (Statements of Senator White, in opposition to the bill. 91 Cong. Rec. 11863 (1945))

Expressions of the Maritime Commission subsequent to the passage of the Act, re-affirm this legislative history.

For example, the Vice-Chairman of the Commission stated before the Subcommittee on Maritime Affairs of the Merchant Marine and Fisheries Committee in connection with H. R. 2336 (81st Congress, 1st Session), as follows (page 22):

"The Ship Sales Act provided a formula by which the Commission in administering the sales under that act, *the prices were mandatory as to what they would be and how they would be arrived at.*"

"The Ship Sales Act fixes the prices at which 'war-built merchant vessels'—roughly defined as those built after September 3, 1939—may be sold." (Report of the U. S. Maritime Commission for the period ended June 30, 1946, p. 6)

2. The Rights of Qualified Applicants to Purchase.

"Under section 4 of the bill, the Commission *is directed to sell a war-built vessel at the statutory sales price to a citizen applicant who is found by the Commission to have the ability, financial resources,* and other qualifications to enable him to maintain and operate the vessel under normal competitive conditions, provided that the Commission also determines that the sale of the vessel will carry out the declared policy of the act." (S. Rept. No. 807, 79th Cong., 1st Sess. (1945), p. 13)

In hearings which took place before the Government Operations Subcommittee of the House Committee on Expenditures in the Executive Departments on March 6, 1950, (81st. Cong. 2nd Sess.) the representative of the Maritime Commission who was charged with the responsibility of handling the ship sales program stated as follows (page 271):

"Under the law they [the buyers] *were entitled to buy the vessel at a price based on a certain formula, and the Commission had no right varying from that formula under the law.*"

"The act grants a large degree of opportunity and protection to the qualified American operator—subsidized or unsubsidized—who wants to purchase or charter ships." (Report of the United States Maritime Commission for the period ended June 30, 1946, p. 6)

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3. The Requirement That the Cost of Class Work be Absorbed by the Government.

" . . . The bill, however, makes express provision for placing all vessels to be disposed of in *normal operating condition for commercial use in peacetime at the expense of the United States. It further provides that the standard vessel for which the statutory selling price is fixed must be in class.*

* * * * *

" . . . it is to be borne in mind that vessels for sale under the bill *are placed 'in class' and are reconverted or re-*

stored for normal operation in commercial services at the expense of the Government." (S. Rept. No. 807, 79th Cong., 1st Sess. (1945) pp. 4 and 12)

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4. The Distinction Between Class Repairs and Desirable Features.

"There is a statutory price for these ships. Let us say there are three or four ships before a prospective buyer for consideration. One is in class and one is not in class. It is certainly not unreasonable to say that there may be different prices placed on them, or, in other words, if a certain ship is not in class, a sufficient amount should be allowed, or expended, to bring it up to class, whatever that may be. *A vessel may have features that are above class.*" (Statement of Senator Radcliffe, 91 Cong. Rec. 11874 (1945))

Relevant Quotations From Previous Decisions of the Court Below Under the Ship Sales Act.

The court below reviewed the legislative history in two prior cases. In the case of *A. H. Bull Steamship Co.* v. *United States,* 123 C. Cls. 520, 108 F. Supp, 95, 97-98 (1952), it summarized that history as follows:

"The Merchant Ship Sales Act of 1946 was intended to fix, by a self-operating statutory formula, the selling price of the Government's surplus ships. Except for the matter of the existence and value of desirable features, which would in any event be a small factor in the price, the determination of the price was a mere mathematical calculation, once the then Maritime Commission had determined, for the type of vessel in question, the prewar domestic cost and the war domestic cost of such vessels . . . "

In the case involving the fireproofing of Liberty tankers, *Southeastern Oil Delaware, Inc., et al.* v. *The United States,* 124 C. Cls. 561, 109 F. Supp. 395, 396, 399 (1953); the court stated:

"In our recent decision in *A. H. Bull Steamship Co.* v. *United States,* Ct. Cl., 108 F. Supp. 95, we discussed the

objectives of the Merchant Ship Sales Act and such of its details as were there pertinent. Congress desired to get the Government's war-built merchant fleet into the hands of private owners and operators on terms fair to the Government and to the purchasers. It provided for formulas for determining the prices at which various types of vessels should be sold, the application of which formulas would, largely automatically, set uniform prices for the vessels. It desired that the vessels as sold should be operable. To be operable they had to be, according to the trade expression, 'in class', that is, in condition to pass the inspection of the regulatory agencies of the Government whose certification of approval was necessary for lawful operation."

" . . . When we consider further the objectives of the Merchant Ship Sales Act of 1946, one of which was to sell Government ships to private purchasers in operable condition, we think that that objective would have been defeated by selling a ship which, as the Maritime Commission should have known, might not be permitted to operate at all."